

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RAYMOND K. KIRKBRIDE

Claimant

VS.

TOTAL PETROLEUM, INC.

Respondent

Self-Insured

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Docket No. 216,667

ORDER

Respondent requested review of the Award dated May 23, 1997, and the Award Nunc Pro Tunc dated June 3, 1997, both entered by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral argument on October 29, 1997.

APPEARANCES

Stephen J. Jones of Wichita, Kansas, appeared for the claimant. Richard J. Liby of Wichita, Kansas, appeared for the respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. Also, the Appeals Board considered the deposition of Paul Stein, M.D., taken on May 14, 1997.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits for an 18 percent whole body functional impairment through April 25, 1996. After that date, claimant's permanent partial disability increased to an 86 percent work disability. Respondent requested the Appeals Board to review the issue of nature and extent of

claimant's injury and disability and whether the Administrative Law Judge should have reduced claimant's award due to preexisting impairment. Those are the only issues before the Appeals Board on this review.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

- (1) Claimant has filed this workers compensation proceeding for a back injury he sustained while working for the respondent on April 6, 1995. The parties stipulated claimant's accident arose out of and in the course of his employment with the respondent. The parties also stipulated claimant's average weekly wage on the date of accident was \$921.60.
- (2) Claimant worked for the respondent at its Arkansas City, Kansas, oil refinery for more than 22 years performing pipe fitting and maintenance work. At the time of his April 1995 accident, claimant was a working foreman and was required to perform heavy manual labor. In addition to lifting and handling 100 to 150 pounds on a regular basis, the job also required much bending and stooping.
- (3) After the April 1995 injury and after seeing several other physicians, claimant ultimately came under treatment of Ponca City, Oklahoma, board-certified orthopedic surgeon George Martin, M.D. Dr. Martin found claimant had a recurrent disc rupture at the L5-S1 intervertebral space and in February 1996 performed a laminectomy, discectomy, and foraminotomy.
- (4) On March 25, 1996, Dr. Martin released claimant to return to work on light duty. Although the record is not entirely clear, it appears in July 1996 claimant resumed his regular duties as a gang pusher and pipe fitter after Dr. Martin released him to return to work without permanent work restrictions and limitations. He then began to experience pain in his back and down into his left leg.
- (5) Claimant returned to Dr. Martin on September 16, 1996, for additional treatment. At that time the doctor recommended two weeks of light duty. Claimant last saw Dr. Martin on September 30, 1996. At that visit the doctor essentially released claimant to perform those activities claimant felt he could tolerate. Dr. Martin testified claimant had an 18 percent whole body functional impairment as a result of the April 1995 injury exclusive of any previous impairment. Dr. Martin did not believe claimant needed any permanent work restrictions. It is not clear whether the doctor's 18% functional impairment rating was determined using the AMA Guides to the Evaluation of Permanent Impairment.
- (6) Before the 1995 injury, claimant had previously sought back treatment from Dr. Martin in 1984. At that time the doctor diagnosed herniated discs at the L4-5 and L5-S1 intervertebral levels. The doctor administered chemonucleolysis treatment followed

by a back-exercise program. In September 1984 Dr. Martin released claimant to return to work without restrictions and limitations. For the 1984 back injury, claimant received workers compensation benefits for a 12 percent whole body functional impairment which was the rating Dr. Martin provided at that time. In a letter to Hartford Insurance Company dated September 18, 1984, the doctor indicated the 12 percent functional impairment rating was in accordance with the 1977 edition of the AMA Guides to the Evaluation of Permanent Impairment.

(7) As indicated by Dr. Martin's office notes, claimant was hospitalized for a short period of time in May 1985 for increasingly severe back and left hip pain after twisting his back at work on May 2, 1985. For that accident, Dr. Martin treated claimant between May and November 1985.

(8) Claimant's last day of work for respondent was on or about September 26, 1996, when claimant's job ended due to the refinery's closure. Respondent did not offer claimant another job or an opportunity to transfer to a different facility. At the time of regular hearing, claimant was not working as he was taking a drafting course at a local community college under a special government program. Before starting the course, claimant attempted to find appropriate employment but could not. Claimant's course began in October 1996 and was scheduled to end in May or June 1997. Therefore, at the time of the regular hearing, the difference between claimant's pre-injury and post-injury wages was 100 percent.

(9) Board-certified neurosurgeon, Paul Stein, M.D., evaluated claimant in October 1995 and in September 1996. He testified claimant had a 15 percent whole body functional impairment which included any impairment which may have preexisted the April 1995 accident. In determining claimant's functional impairment rating, the doctor used the AMA Guides as a guide only and did not necessarily follow its every requirement. Because Dr. Stein did not evaluate claimant for the purpose of formulating work restrictions or see claimant before the April 1995 injury, the doctor did not have an opinion regarding what medical restrictions would now be appropriate or what claimant's impairment before April 1995 might have been.

(10) Board-certified physical medicine physician Lawrence R. Blaty, M.D., evaluated claimant in November 1996. Dr. Blaty testified claimant should permanently restrict his activities to avoid occasional lifting, carrying, pushing, or pulling greater than 40 pounds and frequent lifting greater than 15 pounds. The doctor felt claimant should also be limited to occasional bending and twisting, be given the opportunity to get off his feet at 90-minute intervals, be limited to occasional climbing, and avoid placing his back in awkward positions. For the disc injury, surgical intervention, and residual nerve involvement in the back and left leg, Dr. Blaty rated claimant as having an 18 percent whole body functional impairment according to the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised).

(11) Dr. Blaty reviewed the task loss assessments prepared by both vocational consultant Jerry Hardin and vocational rehabilitation counselor Karen Terrill. The doctor agreed that claimant could not perform those tasks identified as being beyond claimant's abilities by Mr. Hardin and Ms. Terrill. Therefore, Dr. Blaty adopted both Mr. Hardin's and Ms. Terrill's task loss opinions of 75 percent and 69 percent, respectively. The difference between the percentages lies in the fact that Mr. Hardin and Ms. Terrill identified a slightly different number of job tasks.

(12) Claimant now has a 21 percent whole body functional impairment as a result of his back condition. That rating is derived by adding the 12 percent rating which Dr. Martin gave claimant in 1984 with the additional 18 percent which the doctor believes claimant sustained as a result of the April 1995 accidental injury to obtain a 30 percent whole body functional impairment rating and then averaging the 30 percent rating with Dr. Blaty's 18 percent whole body functional impairment rating and Dr. Stein's 15 percent rating.

(13) Although Dr. Martin released claimant to return to work without restrictions after the 1996 back surgery, claimant was unable to perform his regular duties without assistance. Claimant's testimony is uncontroverted that respondent accommodated him by providing additional help when needed. Despite the additional help and accommodation, claimant experienced back symptoms and complaints which required him to take off work and seek additional medical care from Dr. Martin in September 1996.

CONCLUSIONS OF LAW

The Administrative Law Judge awarded claimant permanent partial disability benefits for an 18 percent whole body functional impairment through April 25, 1996, and for an 86 percent work disability after that date.

The respondent contends the Administrative Law Judge erred in two respects. First, it contends claimant's preexisting functional impairment of 12 percent should have been deducted to arrive at the appropriate permanent partial disability percentage. Second, it contends claimant's award should be limited to his functional impairment rating only under the rationale of Watkins v. Food Barn Stores, Inc., 23 Kan. App. 2d 837, 936 P.2d 294 (1997), where the Court of Appeals held that the loss of employment by a worker who returned to work at an unaccommodated job at a comparable wage does not in and of itself overcome the presumption of no work disability as was contained in the former version of K.S.A. 44-510e which applied to accidents occurring between July 1, 1987, and July 1, 1993.

Because his is an unscheduled injury, claimant is entitled to permanent partial disability benefits under the provisions of K.S.A. 44-510e, which provides in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the

physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

The above-quoted statute is modified somewhat by K.S.A. 44-501(c) which provides in part:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

Based upon the testimony and medical records of Dr. Martin, the Appeals Board finds claimant had a 12 percent whole body functional impairment before the April 1995 accidental injury for abnormal lumbar discs at the L4-5 and L5-S1 intervertebral levels. Although Dr. Martin released claimant to return to work for respondent without permanent medical restrictions in September 1984 and claimant was able to perform his job duties relatively symptom free, from time to time claimant did experience aches and pains in his back and was even hospitalized for a short period in May 1985 for severe back and left hip pain. In 1985 Dr. Martin treated claimant for back complaints for approximately six months.

This case is distinguishable from those where an injured worker has an unknown, asymptomatic preexisting condition which neither disables nor impairs. Before April 1995 claimant had undergone chemical injections to treat two herniated discs which had been confirmed by radiological studies. Claimant also had initiated and settled a workers compensation claim in which he had recovered benefits for a 12 percent whole body functional impairment. Although it could be argued that claimant's functional impairment had changed since 1984 or that the Third Edition of the AMA Guides would produce a different percentage, such evidence was not introduced and, therefore, Dr. Martin's 12 percent rating for the 1984 back injury was left unchallenged.

For that period after the accident when claimant was working for the respondent until his termination on September 26, 1996, claimant is entitled to benefits based upon his functional impairment rating because he was earning a comparable wage. After subtracting the 12 percent preexisting whole body functional impairment from claimant's present 21 percent whole body functional impairment, claimant is entitled to benefits for a 9 percent permanent partial general disability for the period in question.

For that period following September 26, 1996, claimant is entitled to a work disability. The Appeals Board finds claimant's true task loss lies somewhere between the low of zero percent indicated by Dr. Martin and the high of 75 percent indicated by Dr. Blaty. Considering that range of task loss, the Appeals Board finds claimant has lost the ability to perform 38 percent of the job tasks which he performed during the 15-year period preceding the April 1995 accident. Averaging the 38 percent task loss with the 100 percent difference in claimant's pre-injury and post-injury wages, the Appeals Board finds claimant has a 69 percent work disability. Subtracting the preexisting 12 percent whole body functional impairment rating from 69 percent yields a 57 percent permanent partial general disability for the period after September 26, 1996.

Because claimant eventually returned to work for respondent and earned a comparable wage from April through September 1996, respondent contends the principles set forth in Watkins limit claimant's award to one based on functional impairment only. The Appeals Board finds that respondent actually accommodated claimant and, therefore, the reliance upon Watkins is misplaced. Claimant's testimony is uncontroverted that respondent provided him assistance when he returned to his regular job as he could not physically do the job without help.

Because claimant enrolled in the drafting program rather than seeking other employment, respondent contends claimant's post-injury wage should be imputed at \$7.50 per hour. The Appeals Board disagrees.

Under Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, ___ P.2d ___ (1997), a worker is required to seek appropriate employment following an injury. The Appeals Board finds claimant made a good faith effort to find appropriate employment after his termination and, when he could not find employment, claimant decided to further his education. The Appeals Board realizes the drafting skills will increase claimant's labor market and his employability. Therefore, the Appeals Board finds claimant's decision to attend school, in this situation, was not an attempt to wrongfully manipulate his workers compensation award. Under these facts, there is no reason to justify deviating from the plain language of K.S.A. 44-510e which directs the fact-finder to utilize the difference in actual pre- and post-injury wages in determining the percentage of permanent partial general disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated May 23, 1997, and Award Nunc Pro Tunc dated June 3, 1997, entered by Administrative Law Judge Jon L. Frobish should be, and hereby are, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Raymond K.

Kirkbride, and against the respondent, Total Petroleum, Inc., a qualified self-insured, for an accidental injury which occurred April 6, 1995, and based upon an average weekly wage of \$921.60 for 4.29 weeks of temporary total disability compensation at the rate of \$319 per week or \$1,368.51; followed by 37.35 weeks for the period through September 26, 1996, at the rate of \$319 per week or \$11,914.65, for a 9% permanent partial general disability; thereafter, for the period beginning September 27, 1996, 199.20 weeks at the rate of \$319 per week or \$63,544.80, for a 57% permanent partial general disability, making a total award of \$76,827.96.

As of November 26, 1997, there is due and owing claimant 4.29 weeks of temporary total disability compensation at the rate of \$319 per week or \$1,368.51, followed by 37.35 weeks of permanent partial disability compensation at the rate of \$319 per week in the sum of \$11,914.65 for the period through September 26, 1996; and thereafter for 96.22 weeks of permanent partial disability compensation at the rate of \$319 per week in the sum of \$30,694.18, for a total of \$43,977.34, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$32,850.62 is to be paid for 102.98 weeks at the rate of \$319 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of December 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stephen J. Jones, Wichita, KS
Robert G. Martin, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director